A **KETUA PENGARAH INSOLVENSI v. SETIAUSAHA, LEMBAGA WAKAF HINDU NEGERI PULAU PINANG & ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
ZALEHA YUSOF JCA
HANIPAH FARIKULLAH JCA
B KAMALUDIN MD SAID JCA
[CIVIL APPEALS NO: P-01(NCVC)(A)-603-10-2018
& P-02(NCVC)(A)-2098-10-2018]
6 FEBRUARY 2020

C ***UNINCORPORATED ASSOCIATIONS:*** *Society – De-registration – Society de-registered and cancelled by Registrar of Societies for failing to adhere to instruction to re-conduct general meeting – Board sought, inter alia, to be absolute owner of Society's assets – Whether Board possessed any rights or interest over assets before de-registration of Society – Whether once Society was cancelled, all assets vested in*
D *Director General of Insolvency – Societies Act 1966, s. 17*

Kuil Sree Selvavinayagar Hindu Paripalana Devasthanam ('Society'), an association registered under the Societies Act 1966 ('Act'), was responsible for the administration of Kuil Sri Selvavinayagar Hindu Paripalana Devasthanam Perai ('temple'). The Society was the owner of seven parcels
E of lands ('lands') and three bank accounts ('accounts'). The Society was cancelled under s. 13(1)(c)(iv) of the Act by the Registrar of Societies ('ROS') ('Registrar's order') for failing to adhere to the Registrar's instruction to re-conduct a general meeting in accordance with the constitution of the Society. Prior to the cancellation, the Registrar informed the Chairman of
F Lembaga Wakaf Hindu Negeri Pulau Pinang ('Board') that the Registrar of Society ('ROS') had no objection on the wishes of the plaintiff to take over the management of the Society. The Board was established under the Hindu Endowments Ordinance 1906 (Straits Settlement Cap 175) ('Ordinance') to administer Hindu religious and charitable endowments. The Majlis
G Mesyuarat Kerajaan Negeri Pulau Pinang later consented to the taking over of the management of the Society by the plaintiff. Following the non-objection and consent, the plaintiff demanded from the former Chairman of the Society to surrender the titles of the lands and the financial records of the Society but to no avail. Upon the cancellation of the Society, the Director
H General of Insolvency ('DGI'), after two meetings, informed the office-bearers that the administration relating to the temple was now under the responsibility of the plaintiff. By way of a re-amended originating summons, at the High Court, the Secretary of the Board ('plaintiff') sought for (i) the Society to be de-registered as the owner of the lands; (ii) the lands to be vested in the plaintiff as the absolute owner of the lands; (iii) the Society to
I be replaced with the plaintiff as the owner of the accounts; and (iv) an order that the Society does not possess any right or interest on the lands and accounts. The DGI objected to the plaintiff's application on the grounds that

they were responsible to administer all the assets belonging to the Society after the Society was de-registered. Allowing the plaintiff's application, the High Court Judge ('HCJ') held that (i) the DGI had no right or interest to the properties belonging to the Society as the plaintiff had obtained its right to manage the temple; (ii) the DGI had only rights to manage the assets of the Society and the assets shall be vested in the plaintiff and consequently, the plaintiff was entitled to manage the assets of the Society; (iii) the plaintiff's application was allowed based on s. 4 of the Ordinance; and (iv) the objections by the DGI on the plaintiff's application should have been brought by way of judicial review. Hence, the present appeals by (i) the DGI; and (ii) the trustee of the Society who was the sixth defendant in the plaintiff's application at the High Court. The respondent in both appeals was the plaintiff. The common issue in both appeals was whether the plaintiff was entitled to the assets of the Society after the Society was de-registered by the ROS.

Held (allowing appeals in part)
Per Kamaludin Md Said JCA delivering the judgment of the court:

(1) The HCJ had rightly stated that, according to s. 17 of the Act, once a registered Society is cancelled, all the assets belonging to the Society are vested in the DGI. However, later on, the HCJ changed her mind when she stated that the DGI had no right or interest to the properties belonging to the Society as the plaintiff had obtained its right to manage the temple. The HCJ seemed to have abandoned the mandatory decree of s. 17(1) of the Act which clearly stated that all the properties of a cancelled Society shall be vested to the DGI. The HCJ failed (i) to address cl. (e) of the provision which says that the DGI shall proceed to wind up the affairs of the Society in accordance with the laws relating to bankruptcy and winding up of a company; and (ii) to take heed on the power of the DGI to make an application to the court for a vesting order of the cancelled Society's assets to a new Society. The law on the matters above were instructive and the HCJ clearly misdirected herself by failing to take into consideration the full operation of the material provision. (para 49)

(2) The HCJ should have maintained her earlier stand that the DGI had vesting rights under s. 17 of the Act to the Society's properties. In other words, the DGI was the rightful party under the law when it came to vesting rights of properties of the de-registered Society. Moreover, in this case the DGI never disclaimed their vesting right to the properties. It was not denied that the DGI had no objection to the taking over of the temple's administration by the plaintiff. However, the DGI submitted that it had never consented for the properties to be vested in

A the plaintiff as it would contravene the mandatory law specified in s. 17(1) of the Act. The management of the properties and vested right to the properties have two different meaning and purpose. (paras 50 & 51)

(3) The HCJ's reference to s. 4 of the Ordinance was misconceived. Section B 4 of the Ordinance speaks about mismanagement of the endowment in which the Governor may order such endowment shall be administered by the board. Although in his submission at the High Court, the plaintiff referred to s. 5(1) of the Ordinance, this provision was however not referred to at all by the HCJ. (para 53)

C **(4)** During the enactment of the Ordinance, the Act had yet to be enacted. The Act only came into existence after the Merdeka day. The Ordinance does not specifically deal with a situation where a Society is cancelled. In contrast, the Act was enacted specifically to deal with any matter relating to a Society and the power of the DGI was spelled out clearly D in s. 17 of the Act. Furthermore, from the reading of s. 5 of the Ordinance, the Governor's power to order the vesting of an endowment is only limited to endowment which is held by a trustee. This provision is peculiar in the sense that it only applies to a property held on trust by a trustee appointed for the management of any endowment. E Distinctively, a Society could not be regarded as trustee as it was an entity established under the Act and it was capable to be regarded as an owner of a property. (paras 56-58)

(5) The plaintiff's action of filing the application showed its scepticism of the Ordinance as s. 5 stated that only upon the order of the Governor F was it sufficient for the endowment to be vested in the plaintiff. The Ordinance did not, in any way, mention that the plaintiff should file an application to the court for the purpose of endorsing the vesting order by the Governor. (para 60)

G **(6)** The maxim *generalia specialibus non derogant* could also be adopted to the facts of this case where the Act as a special law which deals with a cancelled Society shall prevail over the Ordinance which merely mentions the power of Hindu Endowment Board to administer an endowment. (para 62)

H **(7)** Section 17 of the Act, being a specific law to deal with a cancelled Society's property shall prevail over ss. 4 and 5 of the Ordinance. The plaintiff was, therefore, not entitled to the lands upon the cancellation of the Society by the Registrar. (para 65)

(8) There was no need for the DGI to file a judicial review when the gist I of the plaintiff's application was for the properties of the Society to be vested in the plaintiff. The DGI's challenge was purely made on the basis of that issue. The DGI had duly exercised their rights to object against the plaintiff's application. (para 69)

Case(s) referred to:

Aminah v. Superintendent Of Prison, Pengkalan Chepa, Kelantan [1967] 1 LNS 5 HC ***(refd)***

Assa Singh v. Mentri Besar, Johore [1968] 1 LNS 9 FC ***(refd)***

B Surinder Singh Kanda v. The Government Of The Federation Of Malaya [1962] 1 LNS 14 PC ***(refd)***

Director of Customs Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd (In Liquidation)) [1995] 3 CLJ 316 SC ***(refd)***

Hor Chin Ser & Anor v. Villa Genting Development Sdn Bhd & Ors And Other Appeals [2017] 5 CLJ 17 CA ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Malaysian Bar [2006] 5 CLJ 217 HC ***(refd)***

Lee Tak Suan & Anor v. Tunku Dato Seri Shahabudin & Ors [2009] 4 CLJ 365 FC ***(refd)***

Minister Of Home Affairs v. Chu Choon Yong & Anor [1977] 1 LNS 71 FC ***(refd)***

Ong Keh Keong & Anor v. Low Kah Khuen [2019] 1 LNS 357 CA ***(refd)***

Ramasamy Shanmugam v. The State Government Of Penang & Anor [1986] 2 CLJ 121; [1986] CLJ (Rep) 238 SC ***(refd)***

Tunku Abdul Rahman Putra Al-Haj & Ors v. Dato Seri Dr Mahathir Mohamad & Anor [1988] 1 LNS 38 HC ***(refd)***

Winstech Engineering Sdn Bhd v. ESPL (M) Sdn Bhd [2014] 2 CLJ 1 FC ***(refd)***

Legislation referred to:

Companies Act 1965 (repealed), ss. 233, 292(1)
Companies Act 2016, s. 483
Government Proceedings Act 1956, s. 10(1)
Insolvency Act 1967, s. 8
Societies Act 1966, ss. 4, 5, 7, 13(1)(c)(iv), 16, 17(1)(a), (b), 17A, 17B

Other source(s) referred to:

Constitution Of Malaysia: Text And Commentary, 2nd edn, Temporary and Transitional Provisions, pp 360-361

For the 1st appellant - Mohamad Hanafi Basri; SFC
For the 2nd appellant - N Ahilan; M/s N Ahilan & Assocs
For the respondent - Supramaniam Kasia Pillai, Geetha, Supramaniam & Arumugam Ganapathy; M/s Supramaniam & Partners

[Editor's note: Appeal from High Court, Pulau Pinang; Originating Summons No: PA-24NCVC-784-09-2017 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Kamaludin Md Said JCA:

Introduction

[1] There were two appeals fixed before this court as follows:

(i) Civil Appeal No. P-01 (NCvC)(A)-603-10-2018 (Appeal 603); and

(ii) Civil Appeal No. P-02 (NCvC)(A)-2098-10-2018 (Appeal 2098)

[2] Both appeals were heard together. The appeals concerned the decision of the High Court Judge (learned judge) made in Originating Summons No. PA-24NCvC-784-09-2017 in the High Court at Penang dated 14 September 2018.

[3] In Appeal 603, the appellant, Director General of Insolvency is the third defendant. In Appeal 2098, the appellant, Uluganathan a/l KAP Ramasamy who is the trustee of Kuil Sree Selvavinayagar Hindu Paripalana Devasthanam Perai, is the sixth defendant. The respondent in both appeals is the Setiausaha Lembaga Wakaf Hindu Negeri Pulau Pinang who is the plaintiff.

[4] The learned judge allowed the plaintiff's application by way of re-amended originating summons for a summarised prayers as follows:

(i) Kuil Sree Selvavinayagar Hindu Paripalana Devasthanam Perai ('the Society') to be deregistered as the owner of the seven parcels of land, namely Lot No. 305 Geran No. 61, Lot No. 336 Geran No. 62, Lot No. 307 Geran No. 63, Lot No. 308 Geran No. 64, Lot No. 309 Geran No. 65, Lot 5812 GM 355 and Lot 223 GM 673 which are all situated in Seberang Perai Tengah, Penang ('the said lands').

(ii) The said lands to be vested in the plaintiff as the absolute owner of the said lands.

(iii) The Society to be replaced with the plaintiff as the owner of three bank accounts ('the accounts') previously operated under the name of the Society.

(iv) An order that the Society does not possess any right or interest on the said lands and the accounts.

Background Facts

[5] The background facts are as follows:

(i) The Society is an association registered under the Societies Act 1966 which was responsible for the administration of a Hindu temple known as Kuil Sri Selvavinayagar Hindu Paripalana Devasthanam Perai ('the temple'). The Society was the rightful owner of the said lands and the accounts until the order of the learned judge dated 14 September 2018.

(ii) The plaintiff is established under Hindu Endowments Ordinance 1906 (Straits Settlement Cap. 175) for the purpose to administer Hindu religious and charitable endowments.

(iii) The Director General of Insolvency is conferred with wide powers and duties to administer the properties of a bankrupt, wound up company, deregistered Society and deregistered trade union as provided in the laws relating to bankruptcy and the establishment of the aforesaid entities.

(iv) On 2 September 2015, the Society had been cancelled under s. 13(1)(c)(iv) of the Societies Act 1966 by the Registrar of Societies ('the Registrar') for failing to adhere the Registrar's instruction in a letter dated 20 March 2015 to reconduct a general meeting in accordance with the constitution of the Society.

(v) The Society had appealed against the decision of the Registrar but it was dismissed by the Ministry of Home Affairs on 27 June 2016. As such, the order of cancellation by the Registrar remains in force.

(vi) Prior to the cancellation, in a letter dated 18 May 2015 addressed to YB Prof Dr P Ramasamy as the chairman of the plaintiff, the Registrar informed that Registrar of Societies ('ROS') had no objection on the wishes of the plaintiff to take over the management of the Society.

(vii) On 9 September 2015, Majlis Mesyuarat Kerajaan Negeri Pulau Pinang ('MMK') had consented to the taking over of the management of the Society by the plaintiff. Consequently, on 16 October 2015, TYT Yang Dipertua Negeri Pulau Pinang had given his assent to the decision made by MMK.

(viii) By a letter dated 10 December 2015 extended to the former chairman of the Society, Mr Ayapan, the plaintiff demanded him to surrender the titles of the said properties and financial records of the Society but to no avail.

(ix) Thereafter, upon the cancellation of the Society, the Director General of Insolvency *vide* a letter dated 1 August 2017 to the office-bearers of the Society had requested their presence at the Director General of Insolvency's office on 9 August 2017 together with relevant documents and records belonging to the Society. The meeting was held on the mentioned date. A follow-up meeting was later held on 13 September 2017.

(x) Subsequently, in a letter dated 11 October 2017 extended to the office-bearers of the Society, the Director General of Insolvency had informed that administration relating to the temple is now under the responsibility of the plaintiff.

Decision Of The High Court

[6] The Director General of Insolvency, the third defendant, was brought into this action to ascertain out whether the third defendant had the interest in the said lands after the Society had been deregistered as there was no application for judicial review to quash the decision of the Registrar of the Societies.

[7] The Director General of Insolvency objected to the plaintiff's application on grounds that they were responsible to administer all the assets belonging to the Society after the Society was deregistered.

[8] The learned judge was of the opinion that the objections by the Director General of Insolvency on the plaintiff's application for vested right to the said lands should have been brought by way of judicial review which the Director General of Insolvency had failed to commence judicial review proceedings. Hence, the Director General of Insolvency's allegations against the plaintiff should not be raised in the plaintiff's application.

[9] The sixth defendant was brought into this action on his capacity as caveator of the said lands and the trustee of the temple.

[10] The sixth defendant objected to the plaintiff's application on various grounds, *inter alia*, on the plaintiff's capacity to commence this action and the issues whether the plaintiff had the right to the said lands and to the money kept in the Society's account with the bank. The sixth defendant also questioned the plaintiff's action being contrary to provision in s. 17(1)(a) & (b) of the Societies Act 1966 that the power to administer the assets of the Society lay with the Director General of Insolvency. Lastly, as trustee of the temple, whether he had the obligation to register a caveat on the said lands to protect the interest and defend the right of former members of the Society.

[11] The learned judge held *inter alia* that the sixth defendant did not hold any post and he had no *locus standi* in the Society.

[12] It was also held that the sixth defendant failed to prove he had caveatable interest over the said lands. With regards to allegations against the plaintiff, the learned judge held that the allegations were wholly irrelevant because the plaintiff's application is only for the said lands to be vested in the plaintiff's name.

The Issues

[13] The Director General of Insolvency (third defendant) in their submissions as well as in the written submission, focused on one primary issue and another subsidiary issue. The primary issue of this appeal is whether the plaintiff is entitled to the assets of the Society upon the order of the latter's cancellation by the Registrar of Societies and the subsidiary issue is whether the Director General of Insolvency ought to file a judicial review against the decision of the Registrar in challenging the vesting order application.

[14] Whereas, the sixth defendant raised issues surrounding the rights of the plaintiff to commence this action, his rights and obligation as former member of the deregistered Society to register caveat to the said lands. Also raised is the issue that all properties vested in the name of the deregistered Society shall forthwith vest in the name of the Director General of Insolvency.

[15] The sixth defendant concluded that the plaintiff had abused the courts' process and had contravened ss. 17A and 17B of Societies Act 1966 by depriving the Director General of Insolvency from exercising the powers

conferred on them pursuant the said sections to deal with the members of the deregistered Society in regard to the interest of the members and devotees of the temple. In other words, the plaintiff had no *locus standi* to bring this action.

[16] Based on the submissions advanced by the Director General of Insolvency and the sixth defendant, we noted that the common ground of appeal as the main issue is whether the plaintiff is entitled to the assets of the Society after the Society was deregistered by the Registrar of Societies.

[17] Since the submissions for the appeals are on common ground and are almost similar and support one another, to avoid repetition, we reproduce the submission on the issues as given below and the reply by the plaintiff.

Appeal 603

[18] The Director General of Insolvency submitted that the Society is registered under Societies Act 1966 ('the Act'). Pursuant to that, the law to regulate the Society is none other than the Act itself. The Act provides clear guidelines and regulations on the establishment of a Society, membership of a Society, powers of a Registrar, cancellation and deregistration of a Society.

[19] As such, the Act is a specific law framed by the legislators to be the sole authority in setting out benchmark and procedures in relation to any Society registered in Malaysia.

[20] In regards to registration, s. 7 of the Act authorises the Registrar to register a Society upon receiving an application for registration. In the same section, the Registrar is provided with power to refuse any registration of a Society. In addition to that, s. 13 of the Act envisages the power of the Registrar to cancel a Society subject to the conditions laid down in the provision. Meanwhile, s. 5 of the Act gives an absolute discretion to the Minister to declare any Society unlawful if it is in his opinion the formation of the Society is prejudicial with the interest of the security, public order or morality of the country.

[21] The legal implication when a Society is cancelled or deregistered or declared unlawful is spelled out in s. 17 of the Act which says:

> 17 Consequence of order of the Minister under section 5, refusal of the Registrar to register a local Society under section 7 and cancellation of registration of a registered Society under any provision of this Act
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> (1) Upon the making of an order by the Minister under section 5 or upon the refusal of the Registrar to register a local Society under section 7, or upon the cancellation of the registration of a registered Society under any provision of this Act, the following consequences shall ensue:

A (a) the property of the Society shall forthwith vest either in the Director General of Insolvency or if any other officer be, by the terms of the order under section 5, appointed by the Minister for the purpose of winding up the affairs of the Society, then in such other officer;

B (b) the Director General of Insolvency or such other officer as aforesaid shall proceed to wind up the affairs of the Society, and after satisfying and providing for all debts and liabilities of the Society and the costs of the winding up shall pay the surplus assets, if any, of the Society :

C (i) to the Consolidated Fund if the registration was refused or cancelled by virtue of an order under section 5 or on grounds stated in paragraph 7(3)(a) or subparagraph 13(1)(c)(ii) or if the members of the Society so request, and the Minister so directs that such surplus assets be paid to the Consolidated Fund; and

D (ii) in all other cases, to members of the Society according to the rules of the Society, or if there be no such rules, then the Director General of Insolvency or such other officer shall prepare a scheme for the application of such surplus assets for the approval of the High Court;

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(e) for the purposes of the winding up the affairs of the Society, the Director General of Insolvency or such other officer as aforesaid shall have all the powers which are vested in the Director General of Insolvency by any written law relating to bankruptcy for the purpose of the discovery of the property of a debtor and the realization therefore and also such powers as are by any written law relating to companies vested in an official liquidator and all the provisions of the said laws relating to bankruptcy and to the winding up of companies, so far as they relate to the discovery and realization of the property of a debtor and to the winding up of a company, shall, mutatis mutandis, apply to the winding up of the affairs of the Society under this Act.

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(3) The Registrar or the Director General of Insolvency may require or authorize the governing body of the Society, being the governing body existing immediately before the coming into effect of subsection (1) in relation to that Society, or any member of such governing body, or any person who was then or at any time previously an office-bearer, member or employee of that Society, to furnish to the Registrar or the Director General of Insolvency, as the case may be, or to such other person as the Registrar or the Director General of Insolvency may specify, any information in relation to the property, affairs, business, accounts or books of that Society, or any other matter relating to that Society, which may be required for the purposes of this section, and, save as provided

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under subsection (4), such governing body, or member thereof, or such office bearer, member or employee, shall not on account of anything done by it or him in pursuance of such requirement or authorization be guilty of any offence under this Act, provided such thing is otherwise lawfully done.

(4) Where the governing body of such Society, or any particular member thereof, or any person who was an office bearer, member or employee of such Society at any time before the coming into effect of subsection (1) in relation to that Society, fails to comply with any requirement of the Registrar or the Director General of Insolvency under subsection (3), or does anything outside the scope of, or contrary to, any authorisation of the Registrar or the Director General of Insolvency under subsection (3), each of the members of the governing body, or the particular member thereof, or the office-bearer, member or employee, as the case may be, shall be guilty of an offence and shall be liable, on conviction, to imprisonment for a term not exceeding five years or to a fine not exceeding ten thousand ringgit or both.

[22] Upon scrutiny of the above provision, particularly cl. (a), it is incontrovertible that in any event a Society is cancelled or deregistered under any provision of this Act, the property of the Society shall forthwith vest in the Director General of Insolvency for the purpose of winding up. However the same clause also provides that whenever any Society is declared unlawful by a Minister under s. 5 of the Act, he may in the term of his order appoint any other officer to be vested with the property for the purpose of winding up. However, latter is not the case in this appeal. In this appeal, the Society was cancelled by the Registrar under s. 13(1)(c)(iv) of the Act.

[23] Going further, cl. (b) of the provision clearly says that the Director General of Insolvency shall proceed to wind up the affairs of the Society. Upon full payment of debts, liabilities and cost of winding up, the sixth defendant is then obliged to pay any surplus assets either to the consolidated sum or to the members of the Society in accordance with the rules of the Society.

[24] Next, it is important to note that cl. (e) emphasises that the Director General of Insolvency in winding up a Society shall have all the powers endowed to him by the law of bankruptcy and the law of winding up a company for the purpose of winding up the Society. The laws shall be applied with necessary modification subject to the Act.

[25] Further, according to cl. (4), the Director General of Insolvency or the Registrar is empowered to require or authorise the governing body, office bearers, members or employee of the Society to furnish any information pertaining to the affairs, financial, properties and any matter relating to the Society. Failure to comply with the direction of the Director General of Insolvency or Registrar may render them to imprisonment or fine if convicted by the court.

[26] By looking at the whole provision, it is clear as a day that in the event a Society being cancelled, all the properties belonging to the Society shall vest in the Director General of Insolvency. The word 'shall' connotes that this provision is mandatory in nature. This provision had been recognised by the Federal Court in the case of *Lee Tak Suan & Anor v. Tunku Dato Seri Shahabudin & Ors* [2009] 4 CLJ 365, where His Lordship Abdul Aziz Mohamad FCJ said at para. 16:

> [16]. ..When the registration of a registered Society is cancelled, s. 17(1)(a)(b) provides, *inter alia*, that the property of the Society shall vest in the Director General of Insolvency who "shall proceed to wind up the affairs of the Society, and after satisfying and providing for all debts and liabilities of the Society and the costs of the winding up shall pay the surplus assets, if any, of the Society ... to members of the Society according to the rules of the Society ...". I should think that, in the case of dissolution that is also what happens to the surplus assets of a Society, in consequence of the steps that s. 9(h) requires to be taken.

[27] The same stand was taken way before in the historic case of *Tunku Abdul Rahman Putra Al-Haj & Ors v. Dato Seri Dr Mahathir Mohamad & Anor* [1988] 1 LNS 38; [1988] 2 MLJ 532, where YA Ajaib Singh J held:

> Thirdly, on the plaintiff's claim that the defendants be restrained from dealing with assets and liabilities of the old UMNO, I agree entirely with Encik Zaki Tun Azmi on this point. When a Society is cancelled under the Societies Act, all the assets and liabilities of the Society become vested in the Official Assignee and he is duty bound to deal with them in accordance with provision of the Societies Act.

[28] In comparison, the power of the appellant in bankruptcy is derived from s. 8 of the Insolvency Act 1967 which states:

> (1) On the making of a bankruptcy order:
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> ...
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> (b) all the property of the bankrupt shall become divisible among his creditors and shall vest in the Director General of Insolvency and the Director General of Insolvency shall be the receiver, manager, administrator and trustee of all properties of the bankrupt.

[29] In the above provision, the phrase 'shall vest' signifies the mandatory nature of the provision and corollary from that, all the properties of a bankrupt shall vest in the appellant. This authority was recently upheld in the Court of Appeal case of *Ong Keh Keong & Anor v. Low Kah Khuen* [2019] 1 LNS 357, where His Lordship Kamaludin Md Said, JCA held that:

> [74] Be that as it may, on the law, we were of the considered view that Section 8(b) of the Insolvency Act 1967 clearly states that all the property of the bankrupt shall become divisible among his creditors and shall vest in the Director General of Insolvency and the Director General of Insolvency shall be the receiver, manager, administrator and trustee of all

properties of the bankrupt. This simply means that the bankrupt has no legal capacity to deal with his property or to enter into contract related to the property. The section uses the words "shall vest in the Director General of Insolvency" which is mandatory in nature. Hence, any transaction to dispose of the property must be approved or sanctioned by the Director General of Insolvency.

[30] In company's liquidation, the vesting power of a liquidator on a wound-up company is specified in s. 483 of the Companies Act 2016 (formerly s. 233 of the Companies Act 1965) as follows:

483 Custody and vesting of company's property

(1) Where an interim liquidator has been appointed or a winding up order has been made, the interim liquidator or liquidator shall forthwith take into his custody or under his control all the property to which the company is or appears to be entitled.

(see the case of *Hor Chin Ser & Anor v. Villa Genting Development Sdn Bhd & Ors And Other Appeals* [2017] 5 CLJ 17)

[31] Therefore, in bankruptcy and winding up of a company, it is trite that the Director General of Insolvency as an administrator/trustee of a bankrupt or wound-up company is expected to wind up the affairs of the bankrupt or wound-up company based upon the laws relating to bankruptcy and winding up provided in Insolvency Act 1967 and Companies Act 2016. The duty of the appellant provided in those laws includes realising all the assets belonging to a bankrupt and a wound-up company for the purpose of distribution to the creditors and thereafter if there is a balance, to the bankrupt or contributories.

[32] The same is expected of in the winding up of a Society in regards to the duty of the Director General of Insolvency to realise the properties of a wound-up Society and distribute the proceeds to the creditors and the balance, with proper modifications to the respected parties stipulated in s. 17(1)(a) and (b) of the Act. Impliedly, in order to realise the properties, the law provides that the properties of a Society must be vested in the appellant.

[33] Furthermore, it is also pertinent to note that s. 17B of the Act gives a further discretion to the appellant to make an application to the High Court for an order that all the assets, liabilities and debts of a cancelled Society to be vested in a new Society if he is satisfied the following conditions have been met:

(i) the constitution and rules of the new Society are substantially similar with the cancelled Society;

(ii) majority of the members of the new Society consist of the members of the cancelled Society;

(iii) a written request and consent to the vesting order be given to the appellant by the new governing body of the new Society.

(iv) a written undertaking by the new governing body be given to the appellant stating that the new Society will assume the responsibilities of the existing debts and liabilities of the cancelled Society.

[34] The Director General of Insolvency concluded that s. 17 of the Act shall prevail over the Ordinance as the former is a specific law which deals with the cancellation of a Society compared to the Ordinance which merely deals with endowment.

Appeal 2098

[35] The sixth defendant submitted that the Pengarah Pertubuhan had acted contrary to the s. 17A, and B of the Act and it was wrong for the Registrar to handover the management administration of the temple to the plaintiff.

[36] Section 17A and 17B of the Act is clear on governing the Society in regard the management and administration of the temple and therefore it is not an endowment nor does the deregistration of the Society automatically enable the plaintiff to take over the management/affairs of the temple and to seize the land monies in bank belonging to the Society ('temple') and furthermore the Director General of Insolvency has the power under s. 17B to deal with the members of the deregistered Society.

[37] It is clear that under ss. 5, 7 and 17 of the Act, all properties vested in the name of a deregistered Society shall forthwith vest in the name of Director General of Insolvency. The plaintiff's reliance on s. 5 of the Hindu Endowments Ordinance 1906 (Ordinance) as the law which provides for such vested right over the said lands was misconceived.

[38] He further submitted that the Act supersedes the Ordinance 1906 (pre-Merdeka Law) in view that the Act governs the affairs of the deregistered Society in this temple and there is authority for the sixth defendant who was vested with the right, pursuant to ss. 16, 17A, 17B of the Act.

Temporary And Transitional Provisions Existing Laws

162. (1) Subject to the following provisions of this Article and Article 163, the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this Article and subject to any amendments made by federal or State Law.

(2) Where any State law amends or repeals an existing law made by the Legislature of a State, nothing in Article 75 shall invalidate the amendment or repeal by reason only that the existing law, relating to a matter with regard to which Parliament as well as the Legislature of a State has power to make laws, is federal law as defined by Article 160.

...

(6) Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.

Bring it into accord with the provisions of the Constitution. In *B Surinder Singh Kanda v. The Government Of The Federation Of Malaya* [1962] 1 LNS 14; [1962] MLJ 169, the Privy Council held that where there is a conflict between the existing law and the provisions of the Constitution, the Constitution must prevail. The court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution. (see also *Aminah v. Superintendent Of Prison, Pengkalan Chepa, Kelantan* [1967] 1 LNS 5; [1968] 1 MLJ 92; *Assa Singh v. Menteri Besar, Johore* [1968] 1 LNS 9; [1969] 2 MLJ 30; *Minister Of Home Affairs v. Chu Choon Yong & Anor* [1977] 1 LNS 71; [1977] 2 MLJ 20, and *Government of Malaysia v. Iznan Osman* [1977] 2 MLJ 1. Definitions for 'Existing law', 'Federal Law', 'Law Legislature', 'Merdeka Day,' 'State', 'State law', and 'the Federation', (see art. 160 cl. (2) of the Federal Constitution *ante)*;

Constitution Of Malaysia Text And Commentary, 2nd edn *(Temporary and Transitional Provisions, pp. 360-361)*

The High Court in *Datuk Seri S Samy Vellu v. S Nadarajah* explained;

> Articles 162(a) and 162(7) in respect of pre-Merdeka laws ... Require au approach that differs from art 4 in respect of post-Merdeka laws. In the case of the latter a law that is inconsistent with the Constitution is to the extent of such inconsistency, void. In the case of the former, the court may apply the pre Merdeka laws with such modifications, which term includes amendment, adaptation and repeal as may be necessary to bring that provision of the pre Merdeka laws into accord with Constitution.

[39] It was also submitted that the sixth defendant had *locus standi* to enter the caveat to protect the interest of the properties belonging to deregistered temple and also for member of the Society and that if the caveat is not lodge the properties of the temple would be wrongly transferred to the plaintiff and their right to claim after the decision of the Director General of Insolvency would be jeopardised.

[40] In any event it was submitted that the plaintiff does not have *locus standi* to bring the said proceedings in view of the issues raised above.

Plaintiff's Reply

[41] The plaintiff contended that their application amongst others was to have the immovable properties registered in the name of the deregistered Society and the accounts of the Society operated in the name of the

deregistered Society to be vested in the name of Penang Hindu Endowment Board (PHEB) pursuant to the provisions of s. 5(1) of the Ordinance which reads as follows:

> From the date of such order, all the property, both movable and immovable, which the trustees of such endowment, if legally appointed, would have been entitled to administer, shall be vested in the Board the trusts and for the intents and purposes to which the endowment is applicable.

[42] It appears from the reading of s. 5(2) of the Ordinance, the order of the Governor shall be sufficient for the properties to be registered of vested in the name of the Board.

[43] There are also no apparent provisions in the Ordinance for the properties vested in the name of PHEB to be divested or assigned to anybody else. Hence it was submitted by the plaintiff that the PHEB holds all the properties vested in it in perpetuity.

[44] The plaintiff further submitted that both the Ordinance and Societies Act 1966 are federal laws and none is subservient to the other. However, there are express provisions under s. 5 of the Ordinance that upon the order of the Governor under s. 4 of the Societies Act 1966, all properties belonging to a deregistered Society shall vest in the name of the Board. Although the purpose of the Ordinance is to administer Muslim and Hindu Religious and Charitable Endowments but the entities have since been separated and both endowments operate separately under Penang Muslim Endowments Board and Penang Hindu Endowments Board respectively.

[45] The Ordinance is a specific Act and is peculiar in the sense that the Ordinance is only concerned with the affairs of Hindu temples, Hindu shrine or school unlike that of the Act where it involves all societies and being a general act for all societies in Malaysia.

[46] On the issue of *locus standi* of the sixth defendant to enter the private caveats, the plaintiff submitted that the sixth defendant had filed the private caveats on the seven lots of properties on 14 October 2016. On the date of which the private caveats were lodged, the Society had been deregistered and the position of the sixth defendant as the trustee of the deregistered Society had become redundant and the he did not have the *locus standi* to enter the said private caveats. The temple is situated on part of the lands as described in the application by the plaintiff to vest the properties vested and registered in the name of the temple.

Our View

[47] The issues raised before us were straightforward but before going further, we examined the grounds given by the learned judge in her grounds of judgment. In the excerpts of her judgment, she stated as follows:

45. Pendaftaran Pertubuhan Kuil tersebut telah dibatalkan. Jadi, mengikut Seksyen 17, Akta Pertubuhan 1966, maka segala aset-aset dari Kuil tersebut terletak hak ke atas pihak Pengarah lnsolvensi Malaysia.

46. Walau bagaimanapun, hak yang diberikan oleh undang-undang kepada Defendan Ketiga adalah hak untuk mengurus aset-aset Kuil tersebut. Defendan Ketiga tidak mempunyai hak kepentingan atas hartanah-hartanah tersebut.

47. Memandangkan Plaintif telah pun mendapat hak untuk menguruskan Kuil tersebut seperti yang dinyatakan dalam Seksyen 4, Ordinan Wakaf-Wakaf Hindu Pulau Pinang dan dengan pihak Defendan Ketiga dijadikan pihak di dalam tindakan ini dan Defendan Ketiga tidak mempunyai apa-apa hak kepentingan ke atas hartanah tersebut melainkan daripada segi hak mengurus dari segi liabiliti-liabiliti hartanah tersebut, maka saya berpendapat adalah wajar untuk hak hartanah-hartanah tersebut diletakhak kepada Lembaga Wakaf Hindu Negeri Pulau Pinang dan selepas perletakan hak dibenarkan, Lembaga Wakaf Hindu Negeri Pulau Pinang mempunyai hak sepenuhnya untuk mengurus tadbir hartanah-hartanah tersebut.

[48] Looking at the quoted paragraphs, in the beginning, the learned judge had rightly stated that according to s. 17 of the Act, once a registered Society is cancelled, all the assets belonging to the Society are vested in the Director General of Insolvency. However, later on the learned judge changed her mind when she stated that the Director General of Insolvency had no right or interest to the properties belonging to the Society as the plaintiff had obtained its right to manage the temple. She further stated that the Director General of Insolvency had only rights to manage the assets of the Society and it was appropriate for her to rule that the assets shall be vested in the plaintiff and consequentially the plaintiff was entitled to manage the assets of the Society.

[49] In our view, the learned judge seemed to have abandoned the mandatory decree of s. 17(1) of the Act which clearly says all the properties of a cancelled Society shall be vested to the Director General of Insolvency. The learned judge had also failed to address cl. (e) of the provision which says that the Director General of Insolvency shall proceed to wind up the affairs of the Society in accordance with the laws relating to bankruptcy and winding up of a company. Likewise, she had also failed to take heed on the power of the Director General of Insolvency to make an application to the court for a vesting order of the cancelled Society's assets to a new Society. The law on the matters above are instructive and the learned judge had clearly misdirected herself by failing to take into consideration the full operation of the material provision.

[50] It is our considered view, the learned judge should have maintained her earlier stand that the Director General of Insolvency has vesting rights under s. 17 of the Act to the Society's properties. In other words, the Director General of Insolvency was the rightful party under the law when it comes to vesting rights of properties of the deregistered Society. Moreover, in this case the Director General of Insolvency never disclaimed their vesting right to the properties.

[51] From the facts of the case, it was not denied that the Director General of Insolvency had no objection to the taking over of the temple's administration by the plaintiff. However, the Director General of Insolvency submitted that it had never consented for the properties to be vested in the plaintiff as it would contravene the mandatory law specified in s. 17(1) of the Act. In our view, management of the properties and vested right to the properties have two different meaning and purpose.

[52] The learned judge had allowed the plaintiff's application based on s. 4 of the Ordinance which is cited as follows:

> 4. Whenever it appears to the Governor in Council on the report of any such Board that in such State:
>
> (a) any endowment has been mismanaged;
>
> (b) there are no trustees appointed for the management of any endowment; or
>
> (c) it would be otherwise to the advantage of any endowment that the same should be administered by the Board;
>
> the Governor may order that such endowment shall be administered by the board.

[53] In our view, the learned judge's reference to s. 4 of the Ordinance above is misconceived. Section 4 speaks about mismanagement of the endowment in which the Governor may order such endowment shall be administered by the Board. Although the plaintiff in his submission at the High Court had also referred to s. 5(1) of the Ordinance, however, this provision was not referred to at all by the learned judge in her judgment. The section says:

> From the date of such order, all the property, both moveable and immovable, which the trustees of such endowment, if legally appointed, would have been entitled to administer, shall be vested in the Board upon the trusts and for the intents and purposes to which such endowment is applicable.

[54] The word endowment is defined under s. 2 of the Ordinance which says:

> "Endowment" means any endowment in land or money given or to be given for the support of any Hindu Temple, or Hindu Shrine or School or Hindu pious, religious, charitable or beneficial purpose;

[55] The Director General of Insolvency conceded with the fact that the Ordinance is a federal law. This is based on the decision of the Supreme Court in the case of *Ramasamy Shanmugam v. The State Government Of Penang & Anor* [1986] 2 CLJ 121; [1986] CLJ (Rep) 238, where the position of the Ordinance was discussed by the Supreme Court upon challenge by the appellant on its validity. The Supreme Court had declared the law as a valid federal law as it was enacted before Malaysian independence. His Lordship Mohd Azmi SCJ (as he then was) held:

> [1] The said Ordinance, being a Straits Settlement Ordinance, is a pre-Merdeka law. Under items 74 and 78 of the Second Schedule to the Federation of Malaya Agreement 1948, the said Ordinance became a federal law although the exercise of executive authority of the Ordinance could be conferred on a state to the extent permitted by the second column of the Schedule. On Merdeka Day, the federal status of the said Ordinance was extended by Article 162(1) read with Article 160. It is therefore abundantly clear that both immediately before and after Merdeka Day the said Ordinance has always been a federal law, and the said Ordinance being an "existing law" should in accordance with Article 162(1) continue to be in force on and after Merdeka Day.

[56] Be that as it may, it should be reminded that during the enactment of the Ordinance, Societies Act 1966 had yet to be enacted. In particular, the law relating to a Society or the power of the Director General of Insolvency in dealing with assets of a defunct Society did not exist at that time. The Act only came into existence after the Merdeka day.

[57] It should be emphasised that the Ordinance does not specifically deal with a situation where a Society is cancelled. In contrast, as alluded to before, the Act was enacted specifically to deal with any matter relating to a Society and the power of the Director General of Insolvency is spelled out clearly in s. 17 of the Act.

[58] Furthermore, from the reading of s. 5 of the Ordinance, the Governor's power to order the vesting of an endowment is only limited to endowment which is held by a trustee. This provision is peculiar in the sense that it only applies to a property held on trust by a trustee appointed for the management of any endowment. Distinctively, a Society cannot be regarded as trustee as it is an entity established under the Act and it is capable to be regarded as an owner of a property.

[59] The position of a Society as a property-owning entity was acknowledged by the Federal Court in the case of *Lee Tak Suan & Anor v. Tunku Dato Seri Shahabudin & Ors (supra)*. The relevant passages on this issue can be found at paras. 15 and 22 of the judgment as follows:

> [15] With all those incidents attaching to a registered Society, I do not find it possible to conclude that a registered Society is not a legal entity or that the funds or property of the Society do not in law belong to the

A Society. In my opinion references in the Act to the funds or property of a registered Society are not merely a convenient manner of identifying or describing property that does not in law belong to the Society but belongs to the members, but those references actually mean what they say and reflect a recognition that in law the property belongs to the Society.

B ...

[22] If, with the considerations that influenced Farwell J (LJ) and Lord Hanworth MR, a registered trade union was treated as a legal entity, I can see no reason why the Club, being a registered Society, cannot be held to be a legal entity as well. As I said, a Society is a property-owning entity. The Club is governed by rules. Although the Act does not
C expressly provide for a registered Society to act by agents, it has to act by agents, and the Act does envisage a registered Society entering into contracts and incurring debts and liabilities. Section 8A, for example, speaks of contracts entered into by a branch of a registered Society. If a branch could enter into contracts, so could the registered Society itself.
D Debts and liabilities are mentioned, for example, in ss. 17(1)(b) and 178(1). To enter into contracts, a registered Society would have to act by agents. So also to enter into transactions resulting in debts and liabilities.

[60] We agreed with the Director General of Insolvency that the plaintiff's action of filing this application shows its scepticism of the Ordinance as
E s. 5 states that only upon the order of the Governor, it is sufficient for the endowment to be vested in the plaintiff. We also agreed that the Ordinance does not in any way mention that the plaintiff should file an application to the court for the purpose of endorsing the vesting order by the Governor.

[61] It is trite that a specific law shall prevail over any other similar laws.
F This principle was laid down by the Federal Court in the case of *Winstech Engineering Sdn Bhd v. ESPL (M) Sdn Bhd* [2014] 2 CLJ 1. In that case, it was held that:

[18] When a specific law has been enacted pertaining to any power or right relating to legal proceedings, that specific law shall prevail over any other
G similar laws.

[62] In like manner, the maxim of *generalia specialibus non derogant* could also be adopted to the facts of this case whereby Societies Act 1966 as a special law which deals with a cancelled Society shall prevail over the Ordinance which merely mentions the power of Hindu Endowment Board to
H administer an endowment.

[63] In the case of *Director of Customs Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd (In Liquidation))* [1995] 3 CLJ 316, the issue dealt by the Supreme Court was whether s. 10(1) of the Government Proceedings Act 1956 which conferred priority to the sales tax above all
I

debts shall prevail over s. 292(1) of the Companies Act 1965 which ranked such tax as sixth in priority amongst unsecured debts. On this issue, it was held by Wan Yahya bin Pawan Teh FCJ as follows:

> Where there are two conflicting provisions of the Legislature and the question arises which of the two should govern the case, it is the Court's duty to see the terms of which provisions are more appropriate in the circumstance of the case. The principle of linguistic cannons of construction on the use of legal maxim may provide the answer to our case.
>
> The relevant maxim in the present appeal is *generalia specialibus non derogant* - general statements or provisions do not derogate from special statements or provisions, or conversely, *specialia derogant generalibus* - special provisions derogate from general. The Government Proceedings Act 1956 was enacted to provide generally the rights of the Government to sue, its liability, jurisdiction and procedure. Section 10(1) provides in a non specific and general terms that all debts due and claims owing to the Government shall enjoy preferential payments over other competing debts or claims which arise subsequent to the date of accrual of such Government claim. The phrases 'all debts due'; 'claims of every kind'; 'from such persons to any other person whomsoever' are plainly general words and general words are to be understood generally - *generalia verba sunt generalia intelligenda*.
>
> In contrast, ss. 291 & 292 of the Companies Act 1965 are special provisions dealing with a subject distinctive to companies. They relate to the respective rights of secured and unsecured creditors in a winding-up of an insolvent company and make express mention of federal tax (which by virtue of s. 23 of the Sales Tax Act or other related legislation is a debt due to the Government) as ranking sixth in the list of priority amongst other unsecured preferential debts. We have no hesitation in holding that s. 292(1) of the Companies Act 1965 is a special provision dealing with a particular subject and that it is in conflict with s. 10(1) of the Government Proceedings Act 1956.

[64] Similarly in the case of *Ketua Pengarah Hasil Dalam Negeri v. Malaysian Bar* [2006] 5 CLJ 217, it was held that:

> [3] Section 80(13) of the LPA stipulates that the Malaysian Bar be exempted from tax on the compensation fund. The said provision is constituted under art. 96 of the Federal Constitution which provides "No tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law." The LPA is a specific legislation whilst the ITA is a general legislation. Where there is a conflict between the LPA and ITA provisions, the LPA prevails. …"

[65] Based on the above reasons, it is our considered opinion that s. 17 of the Societies Act 1966 being a specific law to deal with a cancelled Society's property shall prevail over ss. 4 and 5 of the Hindu Endowments Ordinance 1906. The plaintiff therefore, is not entitled to the said properties upon the cancellation of the Society by the Registrar.

A

Other Issues

[66] The learned judge held that the Director General of Insolvency ought to have filed a judicial review application against the Registrar's decision. This can be seen at para. 30 of the judgment. The learned judge viewed that the Director General of Insolvency should have raised the issues of his objection in a judicial review application against the decision of the Registrar, however this was not done. As such, the learned judge held that Director General of Insolvency has no right to raise these issues during the plaintiff's application.

[67] As submitted, the Registrar in a letter dated 18 May 2015 only expressed that the Registrar of Societies had no objection to the taking over of the temple's management by the plaintiff due to its internal problem. At that precise time, the Society was not yet cancelled by the Registrar. Furthermore, there was no express order by the Registrar in that letter that the properties of the Society shall be vested in the plaintiff.

[68] It was further submitted that plaintiff itself had not filed any application to the court for vesting order on the Society's assets during the period between the letter dated 18 May 2015 to the cancellation date of the Society on 2 September 2015. The plaintiff had only filed this application two years after the cancellation of the Society, ie, on 12 September 2017. Further, it was submitted that it is preposterous to deny the Director General of Insolvency's right to challenge the plaintiff's application. The plaintiff had served its application to the Director General of Insolvency for the purpose of the matter being heard *inter parte*. Therefore, it shall be the Director General of Insolvency's right to challenge and object the plaintiff's application after finding out that the application runs contrary to the mandatory provision enumerated in the Act.

[69] Be that as it may, in our view, there is no need for the Director General of Insolvency to file a judicial review when the gist of the plaintiff's application is for the properties of the Society to be vested in the plaintiff. The Director General of Insolvency's challenge was purely made on the basis of that issue. In any event, the law is very clear that a Society being cancelled, all the properties belonging to the Society shall vest in the Director General of Insolvency. Therefore, the Director General of Insolvency had duly exercised their rights to object against the plaintiff's application.

[70] The learned judge held that the sixth defendant did not hold any post and he had no *locus standi* in the Society. In this aspect, we agreed with the learned judge. It follows that when the private caveats on the seven lots of properties were lodged by the sixth defendant on 14 October 2016, the Society had been deregistered and the position of the sixth defendant as the trustee of the deregistered Society had become redundant.

Conclusion

[71] In light of the above premises, it is our unanimous decision that there were merits in the appeals. However, we allowed only part of the appeals that the order of the High Court dated 14 September 2018 is set aside except prayer (f) of the order is affirmed.